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IN THE

Supreme Court of the United States

October Term, 1970

No. 981

INDUSTRIAL UNION DEPARTMENT, AFL-CIO and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Petitioners,

v.

THE BLACK HAWK CORPORATION

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Petitioners, Industrial Union Department, AFL-CIO and Textile Workers Union of America, AFL-CIO, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 18, 1970.

Opinions Below

The opinion of the Court of Appeals is reported at —— F.2d ——; 74 LRRM 2836 (CA-4, 1970) and is printed in the Appendix, p. 1a. The Decision and Order of the National Labor Relations Board is reported at 177 NLRB No. 120 (1969) and is printed in the Appendix, p. 13a. The Trial Examiner's decision is printed in the Appendix, p. 22a.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 18, 1970, and this petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1) and under Section 10(e) and 10(f) of the National Labor Relations Act, 29 U.S.C., Section 160(e), and (f).

Question Presented

1. Whether there was substantial evidence on the whole record to support the finding of the National Labor Relations Board that the Black Hawk Corporation had discriminatorily discharged 17 of its employees in violation of Section 8 (a)(3) and (1) of the National Labor Relations Act.

2. Whether the Court of Appeals for the Fourth Circuit properly applied the so-called "substantial evidence rule" in concluding that the National Labor Relations Board had "failed to carry its obligations of proving that Black Hawk was prompted by a discriminatory purpose in discharging the 17 employees."

Statute Involved

The questions discussed in this petition involve the application of the following sections of the National Labor Relations Act: Section 7, 29 U.S.C. Section 157; Section 8(a)(1), 26 U.S.C. Section 158 (a)(1); Section 8(a)(3), 29 U.S.C. Section 158(a)(3); Section 10(e), 29 U.S.C. Section 160(e); Section 10(f), 29 U.S.C. Section 160(f). They are printed in the Appendix, p. 58a.

Statement of the Case

A. The General Operation of the Black Hawk Warehouse

The Black Hawk Corporation (hereinafter referred to as "Black Hawk") is a wholly-owned subsidiary of J. P. Stevens & Company, Inc. (hereinafter referred to as the "Company"). The Black Hawk warehouse was constructed in Greenville, South Carolina in 1960 for the storage and handling of baled cotton which would eventually be used by the Company's twenty-one cotton consuming plants in North and South Carolina, Georgia and Tennessee. The cotton warehoused at Black Hawk comes from cotton-growing regions throughout the United States. While at Black Hawk the cotton is weighed and sampled for testing and classification by the Company's Commodity Division which is also located in Greenville, South Carolina. The Commodity Division has the responsibility for directing the movement of cotton into the Black Hawk warehouse and from there to the respective consuming plants.

The activities at the Black Hawk warehouse generally correspond with the various fluctuations occurring in any

particular cotton season. While the flow of outbound shipments of cotton from Black Hawk remains relatively constant throughout the year, the volume of inbound shipments to the warehouse varies with the seasonal fluctuations in the supply of cotton. As a rule, Black Hawk begins to get busy in August. Its operations gradually increase from that time on until they reach their peak between December and January. After January the activity begins to decline gradually until the slack period is reached sometime in the spring. This slack period usually runs from May until August, when the next season's cotton crop begins to arrive. In years prior to the season in question, 1967-1968, Black Hawk would start hiring additional employees as the cotton inflow began to pick up in late summer and early fall. As this inflow gradually subsided, and the spring slack period was reached, Black Hawk would begin to lay off employees. The employees in the appropriate unit are divided into two groups; a group of white shop employees, who service machines, and a group of Black employees, who work in the warehouse proper. During the 1965-1966 season the number of warehouse employees fluctuated from a high of 69 to a low of 40. In the 1966-1967 season employement of warehouse employees reached a high of 71 and a low of 45. This, then, for at least two seasons preceding the one in question, had been the normal pattern of business activity at the Black Hawk warehouse during an average twelve-month period, from August to August.

B. The Union's Campaign

In June of 1967, the Industrial Union Department, AFL-CIO (hereinafter referred to as the "IUD")[1] began an organizing campaign at the Black Hawk warehouse. The greatest response to that campaign was achieved among the all-Black warehouse employees, who included the 17 employees who are the subject of this petition. The Company became aware of the Union's organizing activities in August of 1967. Moreover, the Company was cognizant that, as a group, the warehouse employees had exhibited the greatest amount of interest in the organizational activities (A 27a-28a).[2] On August 22, 1967, the Union culminated its drive by filing an election petition (A 28a). At that date there was a total of 66 employees working at Black Hawk, 51 of them in the warehouse proper and 15 in the shop.

On September 15, 1967, a hearing on the Union's petition was held and thereafter, on September 26, 1967, a Decision and Direction of Election was issued by the Regional Director for the National Labor Relations Board providing for the election eligibility of all shop and warehouse employees on the payroll as of September 23, 1967 (A 28a).

On October 25, 1967 the election was held, resulting in 22 votes being cast for the Union, 24 votes against, with 17 challenged ballots (A 29a). These challenged ballots include 14 of the 17 employees here involved.

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1. The IUD conducted the organizing campaign involved herein on behalf of the Textile Workers Union of America. The former filed the unfair labor practice charges under its own name and the election petition under the name of the Textile Workers Union of America.

2. "A" references are to the Appendix.

C. The Company's Response to the Union's Campaign

On September 21, three warehouse employees were laid off for lack of work. On September 22, three more were laid off; another was laid off on September 27; three more on September 29; two on October 6; two on October 13, and three on October 18. Therefore, by the time of the scheduled election on October 25, 1967, the strongly pro-union warehouse employee group had been reduced by 17 employees (A 28a-29a). Following the election an additional three employees from the warehouse group were also laid off for lack of work. In Black Hawk's past history, these layoffs had no parallel in either the number of people laid off or the short period of time during which the layoffs took place. Within one month of the representation election better than one-third of the warehouse employees had been laid off. All of this occurred at a time when Black Hawk's activities would normally be accelerating.

As compared with prior seasons, the cotton shipments by the Company to the Black Hawk warehouse during the months of September, October and November of 1967 were at an unparalleled low. During the fall of 1967, the Company shipped a total of only 174 carloads of cotton into the Black Hawk warehouse as compared with 819 carloads during the same period in 1966 (A 36a). Shipments of cotton from Black Hawk to the Company's consuming plants continued to be heavy until September of 1967, at which time the cotton stored at Black Hawk was depleted to between 35,000 and 40,000 bales, less than half of Black Hawk's 90,000 bale capacity. Following September, shipments to the consuming plants were also sharply reduced with only 114 carloads being shipped from Black Hawk during Oc-

tober and November of 1967, as compared with 600 carloads during the same period in 1966 (A 36a).

Notwithstanding the curtailment of activities at Black Hawk during the fall of 1967, the Company simultaneously increased its use of independently-owned warehouses for the storage and consolidation of its cotton. The following is an example: prior to the 1967-1968 season, if cotton consigned to the Black Hawk warehouse arrived in Greenville, South Carolina during a congested period when Black Hawk was not able to handle it; the shipments were diverted to the privately owned Commodity warehouses in Greenville or Paris, South Carolina. In contrast, during the fall of 1967 a very high percentage of the relatively few shipments into the Greenville area were consigned by waybill directly to the Commodity warehouse rather than at the Black Hawk warehouse (A 38a). Therefore, during a period when operations at the Black Hawk warehouse had come almost to a standstill, the Company found it more expedient to store some of its cotton at the Commodity warehouse which charged a $1.40 handling charge and a 50¢ per month storage charge for each bale of cotton stored there (A 44a).

During the critical months of 1967 the Company also altered its practice with regard to outbound shipments of cotton from the outlying independently-owned warehouses it utilizes. In the past, even when the Company found it necessary to store cotton in these outlying warehouses, it had been their practice to ship such cotton into the Black Hawk warehouse for classification before shipping it on to the consuming plant. For example, the rec-

ords of outbound shipments from the Federal Compress and Warehouse Company in Clarksdale, Mississippi, show that in the twenty-two month period ending with July 1967, 131 carloads of cotton were shipped from that warehouse to Black Hawk, while only one carload was sent directly from Clarksdale to one of the Company's consuming plants (A 40a). Shipments were made from the warehouse in Clarksdale to Black Hawk for nine consecutive months prior to August of 1967. In August, however, shortly after the Company learned of the Union's organizing campaign at Black Hawk, shipments from Clarksdale ceased completely for a three-month period. When the shipments resumed again, Black Hawk was quite regularly bypassed and most of the Clarksdale cotton went directly to the consuming plant (A 40a).

Another example of this change in past practice by the Company is provided by an examination of the records dealing with the Company's shipments of cotton to its Industrial plant in Rock Hill, South Carolina. These records indicate that during the six-month period which began in August of 1966, the Rock Hill plant received a total of 183 carloads of cotton, 160 of which had been shipped from the Black Hawk warehouse. Of the remaining 23 carloads, 18 had been shipped from the Commodity warehouse in Greenville, and only five carloads had been shipped directly to the Industrial plant from outlying independently-owned warehouses. In contrast, during the six months beginning in August of 1967 the Company began shipping an increasingly greater percentage of cotton directly from the place of origin to the Industrial plant rather than through the Black Hawk warehouse (A 45a-

46a). Overall, in the first ten months of the 1967-1968 season, the Company shipped about 230,000 bales of cotton directly from outlying warehouses to its consuming plants. This was approximately double the entire volume of such direct shipments in the preceding cotton season.

It is informative also to note that the Company was granted a "transit privilege" by the railroads whenever it had its cotton shipped from outlying warehouses through the Black Hawk warehouse and then on to the consuming plants. Under this transit privilege, an inbound shipment of cotton to any point within the so-called 201 freight rate group, a geographic zone including the Black Hawk warehouse and almost all of the Company's cotton consuming plants, could be sent first to Black Hawk and held there indefinitely, and then shipped on to a consuming plant with no extra charge for the stopover (A 44a). Therefore, the Company paid as freight only the through rate from the point of origin to the consuming plant, notwithstanding the period of time that the cotton remained at Black Hawk during its transit. Nevertheless, rather than utilize Black Hawk's extensive storage facilities, half of which were then empty and earning no income, the Company continued to ship cotton into privately owned outlying warehouses, thereby incurring unnecessary storage expenses which could have been avoided had the cotton been sent to the Black Hawk warehouse for storage.

D. The Board's Conclusion and Order

The Board, with slight modification, adopted the findings, conclusion and recommendations of the Trial Examiner who found that "Stevens deliberately changed past

methods of doing business so as to be able to reduce the volume of cotton moving into Black Hawk and to have an excuse for laying off a substantial number of the group of employees which Respondent had heard contained the largest number of union supporters, namely, the warehouse employees." (A 49a, 16a-17a). Determining that Black Hawk had violated Section 8(a)(3) and (1) of the Act the order directed they "cease and desist" from any further unfair labor practices and to offer reinstatement to the discharged employees (A 53a-54a, 17a).

The representation case having been consolidated with the complaint case, the Board overruled the objections to the 17 challenged ballots and directed that they be opened and counted (A 19a-20a). On November 5, 1969 the challenged ballots were opened and counted and showed 14 votes cast for the Union and three against, resulting in a revised total tally of 36 votes cast in favor of the Union and 27 votes against.

E. Decision of the Court of Appeals

A divided Court, agreeing with the Company's contention that the Board's decision lacked "substantial proof", refused to enforce that part of the Board's order as it relates to the 17 discharged employees (A 2a, 6a). As to the claim that the Company had unlawfully diverted shipments from Black Hawk, the Court stated:

> "We do not think that inferences of unfairly motivated or invidious employee-discrimination are permissible because of the change in shipping practices. Nor may such inferences be drawn in the instant situation from Stevens' history of union bias and knowledge of a current campaign (A 6a)."

Reasons for Granting the Writ

In *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951), this Court expressed the narrow confines of its review of Court of Appeals decisions in cases involving Labor Board matters:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

That the majority below did "grossly" misapply the substantial evidence rule, thereby warranting the issuance of a Writ of Certiorari by this Court, becomes apparent upon the examination of their mistaken reliance on questionable testimony and their failure to give proper allowance to obvious fact. The manner in which the majority misapplied the substantial evidence rule is best stated in the opening paragraph of the dissenting opinion by Judge Winter:

> "After reciting the established rule that the Board's choice between two fairly conflicting views may not be displaced, (citation omitted), and after concluding that the evidence prima facie supports the Board's conclusion that Black Hawk discriminatorily discharged 17 employees in violation of §§8(a)(3) and 8(a)(1), the majority, nevertheless, declines to enforce the Board's order in part (A 7a)."

The majority opinion reached the fateful conclusion by determining that the Board's findings, as to the discrimi-

natory manner in which the Company acted and the motive therefore, lacked substantial support. Their conclusion is best summed up as follows:

> "In sum, the Board has failed to carry its obligation of proving that Black Hawk was prompted by a discriminatory purpose in discharging 17 employees. Black Hawk's justifiable explanation for its conduct stands unrefuted, minifying the effect of the inferences the Board drew from its evidence on motive (A 6a)."

To state that Black Hawk's explanation of its conduct was "justifiable" and "unrefuted", thereby minifying the inferences of an anti-union motive on the part of this Company, ignores the obvious and challenges reality. In setting aside the Board's determination that the 17 employees had been unlawfully discriminated against in violation of Section 8(a)(3) of the Act, the Court of Appeals effectively erased their right to participate in the election and have their challenged ballots counted. By so holding, the Court set aside the Union's first election victory in the first case in which the Board did not have to set the election aside because of this Company's violations against the rights of its employees to freely and fairly choose a collective bargaining representative.

J. P. Stevens' record of unlawful conduct in regard to the rights of its workers to form a union defies one's imagination and is distinguished by its unbending and unceasing determination to destroy, at any cost, attempts at unionization by its employees. Witness the fact that since 1963-1964 J. P. Stevens Co., Inc. has been found guilty, by both the Board and the Courts in *10* separate cases, of voluminous unlawful acts, among them the discharge of *117* em-

ployees (excluding the 17 involved herein) because of their efforts to form a union.[3] In two prior proceedings, Stevens I and Stevens II, this Company was adjudged a law violator for illegally discharging employees at this very same Black Hawk warehouse. As recently as September 30, 1970, the Board found it necessary to seek a contempt citation against this Company for its failure to comply with a Court of Appeals decision and order.[4]

The majority agreed with the Company's contention that the decision to alter its past practice of operations at Black Hawk was motivated by legitimate business considerations. In this regard, the considerations advanced by the Company in justification of these changes have not been legitimate, cannot stand-up under close scrutiny and, moreover,

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3. Stevens I: J. P. Stevens & Co., Inc., v. N.L.R.B., 380 F.2d 292 (CA 2, 1967), cert. denied 389 U.S. 1005.

Stevens II: J. P. Stevens & Co., Inc., 163 N.L.R.B. 217 enf'd sub nom, Textile Workers Union of America v. N.L.R.B., 388 F.2d 896 (CA 2, 1967) cert. denied 393 U.S. 836.

Stevens III: J. P. Stevens & Co., Inc. v. N.L.R.B., 406 F.2d 1017 (CA 4, 1968).

Stevens IV: J. P. Stevens & Co., Inc. v. N.L.R.B., 406 F.2d 1017 (CA 4, 1968).

Stevens V: J. P. Stevens & Co., Inc. v. N.L.R.B., 417 F.2d 533 (CA 5, 1969).

Stevens VI: Black Hawk Corp. —— F.2d ——, (CA 4, 1970) the instant case.

Stevens VII: J. P. Stevens & Co., Inc. v. 179 NLRB No. 47 (1969) pending review before the Court of Appeals for the Fifth Circuit (Nos. 28,631 and 29,037).

Stevens VIII: J. P. Stevens & Co., Inc., 181 NLRB No. 97 (1969) pending review before the Court of Appeals for the Fourth Circuit (Nos. 14,450 and 14,530).

Stevens IX: J. P. Stevens & Co., Inc., 183 NLRB No. 5 (1970) pending review before the Court of Appeals for the Fourth Circuit (Nos. 14,739 and 14,842).

Stevens X: Black Hawk Corp., 183 NLRB No. 34 (1970).

4. N.L.R.B. v. J. P. Stevens & Co., Inc., before the Court of Appeals for the Fifth Circuit (No. 26,246).

as the dissent below points out, was actually more expensive for the Company. A storage fee of between 40¢ and 50¢ per bale per month is charged at any warehouse, including Black Hawk, but since Black Hawk is a wholly-owned subsidiary of the Company, the charge for cotton stored at Black Hawk is more illusory than real. To pay to store cotton in the independently owned warehouses for extended periods of time rather than storing it at Black Hawk at a time when space and manpower were available is economically implausible.

No more satisfactory is the Company's explanation for the switch to the practice of stripping cotton directly from outlying warehouses to consuming plants, by-passing Black Hawk. It was claimed that the Company could save the cost of loading, handling and reloading at Black Hawk—approximately $1.40 per bale—by shipping direct. The speciousness of this explanation was exposed by the dissent, which stated:

> "Even if the estimate of $1.40 per bale cost of handling at Black Hawk is accepted, the explanation overlooks the greater expense involved in storing cotton in independent warehouses for extended periods of time rather than at Black Hawk, a wholly-owned subsidiary, which was established and enlarged for this very purpose, and which had space, during the greater part of the period in question, to accommodate the cotton. Warehouse charges at an independent warehouse range from 40¢ to 50¢ per bale per month, and indirect expenses at Black Hawk continue whether it is used or not. Freight costs for shipping into Black Hawk and then to most of the manufacturing sites are no greater than direct shipments to plants from independent warehouses" (A 10a).

In discussing the Company's decision to by-pass the Black Hawk warehouse in shipping cotton to its consuming plants, the majority decision concluded that "Whether or not the rearrangement was warranted was a matter of the internal economy of the business, to be resolved by the Company," citing with approval *J. A. Hackney & Sons, Inc. v. N.L.R.B.*, 426 F.2d 943 (CA-4, 1970). The petitioner denies that there is any parallel between the factual situations of the *Hackney* case and the instant case. In *Hackney*, where the Company was charged with having discriminatorily discharged forty-one employees, the Company also raised the defense that the discharges were motivated by economic considerations. But unlike the instant case, the company there came forward with a persuasive set of circumstances to sustain their defense. In that case, the company produced evidence that, after enjoying several prosperous years, the entire glass industry, including itself, was adversely affected by a major strike in 1968. As a consequence of this labor dispute the company suffered a serious business decline which eventually necessitated the curtailment of its operations. The Court there concluded: "Against the overwhelming evidence of an economic motivation for the discharges, as well as the non-discriminatory manner in which they were effectuated, the inferences which the Board drew from the 8(a)(1) activities * * * cannot stand."

The Company's defense of economic justification in the instant case was clearly far from overwhelming. Thomas Woodside, the only witness called by the Company to testify concerning its decisions regarding the purchasing and movement of cotton (A 49a, footnote 11) and upon whose

testimony the majority relies for its finding, was found by the Trial Examiner who observed his demeanor and manner while testifying, to be "*not a wholly reliable witness*" (A 48a) (emphasis ours). In discussing Woodside's testimony, Judge Winter, in his dissent, perceptively noted:

> "Initially, Controller Woodside testified that there was no appreciable increase in direct shipments to the plants in the period beginning in August 1967; *but when general counsel proved otherwise, Woodside changed his testimony* and admitted that in the first ten months of 1967–1968 season, Stevens nearly doubled the volume of its direct shipments, as compared with the entire preceding season" (A 10a) (emphasis ours).

That the majority below bases its opinion upon the testimony of such a questionable witness, substituting its judgment for that of the Trial Examiner and the Board as to the veracity of his explanations and statements, heightens the gross distortion and misapplication of this Court's "substantial evidence" rule laid down in *Universal Camera supra* and *N.L.R.B.* v. *Walto Mfg. Co.*, 369 U.S. 404.

Perhaps even more distressing is that the majority below relied upon the statement of a questionable witness employed by a Company which has been found to deliberately require its managerial personnel to lie on the witness stand. Witness the following observations made by the late Trial Examiner, Boyd Leedom, in his decision against this Company in J. P. Stevens & Co., Inc., 167 NLRB 266, 273-274:

> "As will appear, where there has been a direct conflict in testimony of witnesses called by the Respondent and those put on the stand by the General

Counsel. I have in the main credited the testimony adduced by the General Counsel.

* * * These views on credibility resolution are set forth in part because many of the findings hereafter made reject the testimony of numerous witnesses who hold positions in middle and lower management echelons of the Respondent Employer. I am charged with and do take notice of the previous cases which legally establish at this point that Respondent and the persons who share in the responsibility of forming its policy in dealing with the Union here involved are predisposed to defeat the Union and the employees in their right to act in concert respecting wages, hours, and working conditions, even though such opposition involves violating the Labor Management Relations Act.

* * * Such witnesses, who took an oath to tell the truth, offered evidence not accepted here, which if colored or untrue, nevertheless was offered seemingly without compunction.

* * * I have the inescapable but independently reached conviction, erroneous as it may be, from having heard innumerable witnesses at the trial and having carefully digested and reviewed their testimony from the typewritten transcript, that many of the witnesses called by Respondent testified as they did pursuant to a policy, made at a higher level of management than theirs, to defeat this Union's organizational effort at the cost, if necessary, of committing unfair labor practices and then denying the unlawful acts in the process.

* * * and that is what I here seek to do, greatly deploring what seemed to me to be a flagrant breach by many of the promises made under oath to tell the truth.

* * * And underlying the discussion is a faint hope that something here written might tend to produce a new appraisal in some quarters of the methods used

> in opposing employees' rights to organize. For if, as I believe and find, there has been a deliberate intention on the part of some to bring about a result in this case not based on truth, such persons will not only add substantially to the measure of human misery if they succeed, but more importantly, perhaps, they have added their very considerable weight to the persistent and pervasive disregard of the rule of law, that now afflicts our society."

It is obvious from the numerous violations committed by this Company after these words were penned by Boyd Leedom that his plea for "a new appraisal in some quarters of the methods used in opposing employees' rights to organize" fell upon deaf ears and blind eyes insofar as J. P. Stevens & Co., Inc. is concerned.

By its own test[5] the findings of the Court below must fail for the inference drawn by the Board were not "so overborne" by evidence calling for a contrary conclusion. At best, the facts give rise to more than one view. Where there is a difference between the Board's view and the Court's, the Court may not substitute its view nor "displace the Board's choice" between the two views where the Board's decision is supported by substantial evidence. *Universal Camera, supra.* This is true even where the Court could have justifiably drawn a different conclusion had it heard the case *de novo.* In accordance with the scope of review delineated by *Universal Camera* and reiterated

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5. A 5a "In this the test is whether

> 'the inferences on which the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not * * * be deemed to be supported by 'substantial evidence.' N.L.R.B. v. Pittsburgh S.S. Co., 340 U.S. 498, 502 (1951)."

by the Court in *Walton*, such finding, when as here supported by substantial evidence, should not have been disturbed on review.

Conclusion

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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Dated: November 16, 1970

Addendum

Due to the length of the lower court opinions, the Appendix, consisting of the Court of Appeals' Decision (A 1a), the Board's Decision and Order (A 13a), the Trial Examiner's Decision (A 22a), and the Statutes involved (A 58a), has been reproduced in a separate volume.